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U S WEST

Ex Parte

November 14, 1997

Ms. Dorothy T. Attwood, Esq.
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1919 M Street, N.W.
Room 533
Washington, D.C. 20554

RE: Additional Items for Consideration in Deliberations of Meaning of Section 222 of the Telecommunications Act of 1996 and the Commission's Ongoing Customer Proprietary Network Information ("CPNI") Proceeding; Customer Approval for Internal Access, Use and Disclosure of Customer Proprietary Network Information, CC Docket No. 96-115; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149

Dear Ms. Attwood:

U S WEST, Inc. ("U S WEST") takes this further opportunity to introduce into the record in the above-referenced proceedings a number of different items and discussions.

First, we begin by quoting Chairman William Kennard regarding the scope and role of regulatory intervention in the implementation of the Telecommunications Act of 1996 ("Act" or "1996 Act") and the anticipated flow of benefits from the Act itself. Chairman Kennard's remarks, stressing inclusiveness, common sense, narrow tailoring, and the avoidance of unnecessary burdens on customers and businesses strongly suggest that a notice and opt-out model would be an appropriate regulatory approach to secure customer approval for broad CPNI use. They are certainly inconsistent with an affirmative consent model.

Second, we provide a transcript of some recent remarks of Representative Edward Markey regarding his concepts of customer approval with respect to individually-identifiable information. Those concepts can be captured in his oft-repeated mantra of "Knowledge, Notice and No." As already demonstrated and included in the record, it is

clear that Section 222 is an iteration of earlier legislative proposals dealing with CPNI, proposals sponsored by Rep. Markey. His comments provide further confirmation of the fact that the term "approval" used in 47 U.S.C. Section 222(c)(1) should not be equated with the need for affirmative consent in order to access and use CPNI. Rather, individuals should be provided with opportunities to disapprove disclosed uses.

Third, we address the Staff's reference to an *ex parte* submission by Wireless Technology Research, L.L.C. ("WTR") dealing with the use of CPNI in scientific and medical research. Based on a recent *ex parte* contact that U S WEST participated in, the Staff, apparently, has some sense that the percentage of individuals that were secured to participate in a scientific survey dealing with radio frequency ("RF") emissions, induced in part through the offer of free cellular airtime, is of some significance to the issue of the ability of a company to secure affirmative consents to use CPNI. We demonstrate below that there is no relevance of one to the other. No rational implications regarding affirmative consent to access or use CPNI can be devolved from the WTR epidemiologic survey.

Fourth, we address the matter of whether or not mechanical-type access controls/restrictions need to be put in place with respect to carrier information in the possession of other carriers. Given existing computer technology and audit controls, there is no need to require the implementation of additional controls.

Fifth, we address two MCI *ex partes* – one from August and one from October. We point out the fallacies of certain MCI assertions dealing with privacy, the value of CPNI and the cost of systems conversions to create mechanical, system access restrictions to CPNI. We also rebut certain of MCI's remarks regarding our affirmative consent CPNI trial and its commercial and market implications.

Overall, our comments herein provide additional, relevant evidence on why the Commission should pursue a notice and opt-out model with respect to CPNI access and use by telecommunications carriers. Such a model is consistent with the language of the statute, its congressional history, market needs and common sense. It is the model that should be adopted by the Commission.

Chairman Kennard's Remarks

In a Statement prepared in conjunction with his confirmation hearings,[1] Chairman Kennard made three points that have particular significance to the ongoing discussions about the

[1] Statement of William E. Kennard, Confirmation Hearing Before the Commerce, Science, and Transportation Committee, United States Senate, October 1, 1997 ("Kennard Remarks").

meaning of Section 222, its application to telecommunications carriers and its impact on the market. First, Chairman Kennard stressed that "the benefits of the communications revolution [should be] available to everyone."[2] Second, he stressed the importance of "common sense" in crafting regulatory regimes and rules.[3] Third, he endorsed the adoption of regulations "only when necessary;" then "narrowly tailored" and lacking "unnecessary burdens."[4]

With respect to Chairman Kennard's first goals – the realization of the benefits of the communications revolution by everyone – he continued: "Whether you live in a metropolitan area, a rural community, or a distressed inner city, communications technology should give you the same benefits and opportunities. I will work hard to ensure that the communications revolution is inclusive – not exclusive – and that small businesses, women and minorities are not left on the sidelines of the communications revolution."[5] While Chairman Kennard was addressing his remarks to the "communications revolution" and the intersection of "communications technology" to that revolution, it is clear that his remarks have broader application. The telecommunications revolution cannot be inclusive, rather than exclusive, if customers and the companies they do business with must undergo cumbersome, inflexible approval processes with respect to CPNI. It is CPNI that forms the foundation for educated speech to customers, that allows for an inclusive approach to the provision of telecommunications services and that allows those customers that either affirmatively desire communications about such services[6] or whose interest in such communication may vary from day to day, transaction to transaction, to be reached and served. Particularly with respect to the mass market, the provision of services can be expected to be retarded if the ability to reach those customers easily and with minimum expense is blocked by cumbersome and burdensome regulation.[7]

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[2] Id. at 4.

[3] Id.

[4] Id.

[5] Id.

[6] As the Westin/Pacific Telesis survey demonstrated, telecommunications customers are interested in hearing from their serving carriers about new products and services. Individuals familiar with notice and opt-out processes, women and minorities were more interested than the average individual in being engaged in such communications. See "Public Attitudes Toward Local Telephone Company Use of CPNI, Report of a National Opinion Survey conducted November 14-17, 1996," submitted by Pacific Telesis in January, 1997, Survey Questions 7, 9-10; Analysis at 5, 9.

[7] This was certainly one of the basic assumptions with respect to the provision of voice mail services ("VMS"), for example. The mass market was not being served prior to the time that Bell Operating Companies ("BOC") were permitted to market such services on an integrated basis and were able to use CPNI in order to target and package VMS offerings in a manner attractive to various market segments, but often differently within or among segments.

Chairman Kennard's second principle, i.e., that "[t]he FCC should always act with common sense,"[8] also cries out for flexible, easy-to-do-business with CPNI approval mechanisms. CPNI rules that would require carriers with whom individuals have an existing business relationship to secure affirmative consent before information relating to them can be accessed or used would fail to live up to the Chairman's expectation of rules that "should be practical, and reflect an understanding of the markets and businesses they affect." Nor would such rules "be in touch with people's real needs and daily demands."[9] U S WEST has already put evidence into the record regarding the confusion attendant to CPNI restrictions in the small business segment.[10] The "needs and daily demands" of these customers are sometimes hampered by restrictions which the customers themselves may have had some hand in triggering, but which customers truly do not understand. Similarly, to reflect an "understanding of the markets and businesses they affect," CPNI approval rules must not create a barrier to targeted carrier-customer communications (including marketing) or satisfaction of the customer's total telecommunications needs.

Based on the Chairman's remarks, a notification and opt-out process for CPNI approval would clearly advance his goals. It would allow for the provision of telecommunications products and services to remain inclusive. And, it would represent a practical approach to the approval process in a manner that reflected both the market and the affected businesses. Furthermore, as discussed immediately below, it would be in concert with the intentions of the drafters of Section 222, as well as the self-executing nature of that Section. There is nothing in Section 222 to suggest that Congress anticipated or deemed necessary the promulgation of Commission regulations. Thus, under the Chairman's analysis, one could argue that no such regulations are "necessary." But, even if necessity is determined, the regulations should be "narrowly tailored" and should avoid the imposition of "unnecessary burdens." A process that requires telecommunications carriers to secure affirmative consent to access and use CPNI from millions of individuals fails to meet either of these latter criteria.

Representative Markey Remarks

U S WEST has demonstrated that Section 222 was but the last in a series of CPNI provisions introduced in Congress in previous Sessions.[11] Earlier iterations of the legislation confined its application to local exchange carriers ("LEC") and required "affirmative consent" before CPNI could be used for certain purposes. However, Section 222 (like its immediate

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[8] Kennard Remarks at 4.

[9] Id.

[10] U S WEST Comments at 18-19, CC Docket No. 96-115, filed June 11, 1996.

[11] Id. at 10; U S WEST Reply Comments at 11 n.52, filed June 26, 1996; U S WEST Reply Comments at 8 n.20, CC Docket No. 96-115, DA 97-385, filed Mar. 27, 1997.

predecessor) extended the application of the legislative provision to all telecommunications carriers and eliminated the requirement for "affirmative" consent, substituting the term "approval."[12]

These legislative changes were not serendipitous or accidental. Rather, they reflected the position of their primary author, Representative Markey, and were consistent with his reflected approach to informational privacy and business: Individuals should have the benefit of "Knowledge, Notice and No."

Attached to this correspondence, you will find a transcription of recent remarks by Representative Markey that articulate the fundamentals of this policy.[13] Key to this policy is that individuals be given notice by entities who collect and hold individually-identifiable information (of which CPNI is a segment) about them and that those individuals be provided with an opportunity to say "no" regarding such disclosed use. In the vernacular of information policy, Representative Markey's remarks support individuals being provided with notice of information uses and an opportunity to opt-out.

Representative Markey's remarks were made in the context of addressing electronic commerce, in particular, but they have applicability beyond that. For example, he posits that companies that surreptitiously collect information and "compile lists of highly personal information" "undermine[ ] trust in the [electronic commerce] community."[14] He goes on:

> [M]y privacy position is premised on the belief that regardless of the technology that consumers use, their privacy rights and expectations remain a constant. . . . These core rights are embodied in a proposal that I have advocated for many years, and I call it Knowledge, Notice, and No.
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> . . .
>
> [K]nowledge that information is being collected . . . .
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> Adequate and conspicuous notice that any personal information collected is inten[d]ed by the recipient for reuse or resale.

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[12] Id.

[13] Transcription of Cassette Tape, "Congressional Perspectives - Rep. E. Markey Telecom Privacy in the US – and for US Companies," remarks of Representative Markey before audience at Privacy & American Business Conference, October 23, 1997, Breakfast Session.

[14] Id. at 12.

> [T]he right of the consumer to say no, and to curtail or prohibit such reuse or sale of their personal information.[15]

Representative Markey goes on to note that he believes that these consumer privacy rights can be exercised through "industry standards and self-regulation," as well as through technological tools and – finally – a regulatory regime where the market and technology fail. He observes: "I believe it is in the industry's interests to work towards *practical* solutions now" and that "a purely marketplace approach will fail in instances where the customers have no idea that a commercial entity is using data in ways that customers [might] disapprove."[16] Clearly, Representative Markey's model is one of notice and the right to "disapprove" or opt-out of certain uses.

Given that the model discussed by Representative Markey is consistent not only with broad commercial practice, but is a model endorsed by the Administration's Privacy Task Group,[17] the NTIA,[18] and other Congressional enactments,[19] provides strong evidence that Congress intended no material or significant alteration to accepted commercial or information collection and use practices when it adopted Section 222. A notice and opt-out approval process with respect to CPNI meets Congressional and Administration intentions with respect to the collection, use and distribution of individually-identifiable information. And, such an approval process is accomplished with a minimum of government intervention or regulation, both of which is appropriate given the lack of any required Commission involvement in the implementation of Section 222 – a self-executing provision.

WTR August 14, 1997 Submission

In a recent *ex parte* meeting between U S WEST personnel and Commission Staff, reference was made to a customer response rate in the area of 72% to certain submitted written materials requesting affirmative response (a questionnaire), when the incentive for participation

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[15] Id. at 13-14.

[16] Id. at 14-15 (emphasis added to the word "practical").

[17] "Principles for Providing and Using Personal Information," National Information Infrastructure Task Force ("NIITF"), Fairness Principle, June 6, 1995.

[18] "Privacy and the NII: Safeguarding Telecommunications-Related Personal Information, Department of Commerce, National Telecommunications and Information Administration ("NTIA"), 1995, at 25 and n.98. U S WEST has commented on the NTIA's general endorsement of a notice and opt-out model in our response to the March 27, 1997 NTIA filing before this Commission in CC Docket No. 95-116. We have pointed out that NTIA's published report in this area supports the use of a notice and opt-out process and that NTIA's deviation from this position with respect to a BOC's Section 272 affiliate is not well reasoned. U S WEST Ex Parte Letter, dated Apr. 11, 1997 at 3-4 and n. 12.

[19] 47 U.S.C. § 551(a)(9).

was 30 minutes of free cellular airtime. This remark was made, ostensibly, to suggest that perhaps U S WEST had not devined the best affirmative consent model and/or incentive when it conducted its CPNI affirmative consent trials, to secure affirmative customer consents regarding CPNI collection and use.[20]

U S WEST has now secured the information being referenced by the Staff in our earlier meeting. We see no relevance between the referenced *ex parte* and U S WEST's affirmative consent trials. It is inauthentic to compare solicitation of individuals for research survey purposes and solicitations of far more ephemeral matters, i.e., the collection and use of CPNI. A solicitation to participate in targeted research projects cannot be compared with a communication about the use of individually-identifiable information. The one involves a level of interest, interaction and activity that the other does not. Additionally, in the cellular use research survey (described more below), individuals were not asked to supply or authorize the use of account information at all. In fact, that information had already been compiled and provided to the researchers without the customers' knowledge. Individuals were asked to complete a self-report of their usage and equipment, as if the information was not known to the recipient of the information. In essence, the process was not transparent with respect to information collection and use. Rather, it was used as a mechanism of determining whether what individuals thought they did regarding certain matters (cellular usage) comported with what they actually did.[21] If a good correlation could be found between the information provided and the information already collected, there would be less need to continue to engage individuals in self-reporting and institutional records already in existence could be relied on.

Furthermore, even were such comparisons appropriate, the suggestion that 30 minutes of free airtime might prove the best or right incentive ignores the fact that the vast majority of U S WEST's customers might not be in a position to take advantage of such an incentive, failing as they might to subscribe to any type of wireless service. As significantly, it suggests that U S WEST would be expected to expend huge sums of money in extending some type of product/service incentive before we were allowed to access and use our own commercial information for product design, development and targeted communications to existing and potential customers. Such a ruling would be unprecedented in commercial practice.

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[20] Ex Parte letter to Dorothy T. Attwood, Common Carrier Bureau, from Kathryn Marie Krause, U S WEST, dated Sep. 19, 1997 at 9-10.

[21] "The strong correlations that we observed indicate that billing records can serve as a reasonable measure of telephone use by the account holder." Utility of Telephone Company Records for Epidemiologic Studies of Cellular Telephones," Funch, Rothman, Loughlin and Dryer, 1996 Epidemiology Resources, Inc., at 301 ("Funch et al. Study").

Specifics of the WTR Survey Project

To summarize the WTR *ex parte*. In August of this year, WTR made an *ex parte* contact with the Commission Staff, and submitted written materials, addressing "'records-linkage' epidemiological studies [as] an essential tool [ ] in researching potential risks to public health and the need for epidemiologists to have access to customer cellular telephone usage data."[22] In the written materials submitted in conjunction with that Staff meeting, reference is made to an epidemiologic study conducted "of over 5,000 telephone users who were customers of one large cellular telephone company covering four major geographical areas."[23]

In describing the specifics of the survey method, the following facts are related: that potential survey participants were "randomly selected from each of three revenue categories;"[24] and that the company "mailed letters offering 30 minutes of free airtime for completing and returning an enclosed survey;" with a follow-up mailing being sent to the potential participants who had not responded 10 weeks later.[25] The process resulted in a response rate of 71% to the survey, similar across the four geographical areas and the three levels of wireless revenue categories.

The WTR Survey Returns Are Not A Legitimate Comparison For CPNI Affirmative Consent Purposes

It is inappropriate to suggest that the solicitation of individuals for research survey purposes (a concrete action) is similar to the solicitation of affirmative consents *vis-a-vis* CPNI collection and use. The one requests individuals to participate in a very specific action, generally associated with "public opinion" and public interest. The other involves the communication of a highly abstract message that is confusing to individuals.[26] In particular, the association of the survey to potential matters of health concern (matters publicly addressed in the press) suggests a level of individual engagement, even absent the incentive, that could be assumed to produce a

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[22] Letter to Mr. William F. Caton, Secretary, Federal Communications Commission, from Linda T. Solheim, General Counsel, WTR, dated August 14, 1997.

[23] Funch, et al. Study, Appendix C.

[24] Id. at 300.

[25] Id.

[26] Both U S WEST and Ameritech have represented that confusion exists in the communication. See Ex Parte letter to Dorothy T. Attwood, Common Carrier Bureau from Kathryn Marie Krause, U S WEST, dated Sep. 9, 1997 at 14; Ex Parte letter to Dorothy T. Attwood, Common Carrier Bureau from Kathryn Marie Krause, U S WEST, dated Oct. 8, 1997. And Letter to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, October 6, 1997, written *ex parte* submission associated with meeting with Commission Staff (at Attachment D) ("customers often expressed confusion as to why Ameritech would make . . . a request [to access/use CPNI].")

higher-than-average response.[27] When this overall inclination is combined with free airtime, the fact that the response rate was high is not surprising.

Furthermore, even if one were to assume that the objects of the solicitation could be fairly compared, the suggestion that the "cost" of a fairly solid percentage level of affirmative customer consents for CPNI use might come in at around 30 minutes of free airtime (or a total incentive value of around $11 on the average) ignores the fact that wireless airtime would only be material as an incentive to (a) those individuals that use wireless services and (b) those that secure those services from the same carrier wanting to access and use the CPNI. Of course, the vast majority of the mass market consumer base does not use wireless services. And, often consumers have different telecommunications carriers for the various services.[28]

The above facts mean that what is really being suggested is that an incentive larger than that provided by U S WEST (a $1 or $5 pre-paid calling card) would perhaps be necessary to secure affirmative consent. Rather, an incentive in the area of $10-$11 might be required. This ignores at least three other facts or factors:

1. That U S WEST's affirmative consent CPNI trial demonstrated that the incentive itself was fairly immaterial and irrelevant to the granting of consent in the first instance.[29]

2. That the crafting of "incentive programs" is as much an art as a science. Traditionally, wireless/cellular customers have been very concerned about the cost of airtime. An incentive involving airtime seems particularly well suited to represent a high "value" to such individuals.[30] Crafting an incentive program where the individual and the incentive are matched with respect to "relative value" in hopes of affecting future behavior is not easy. For a landline subscriber, for example, wireless free airtime is immaterial. A more meaningful and intriguing incentive for such a customer might be found in a pre-paid calling card (such as was used by U S WEST in its CPNI affirmative consent trial) or free

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[27] Indeed, as U S WEST has demonstrated, on inbound calls, when individuals are engaged in communications about telecommunications products and services, affirmative consents were secured at around the 72% level. Ex Parte letter to Dorothy T. Attwood, Common Carrier Bureau, from Kathryn Marie Krause, filed Sep. 9, 1997 at 9, 14.

[28] By this remark, U S WEST does not mean to concede that local exchange and wireless services are, by their nature, two distinct or discrete services with respect to a "bucket" approach to interpreting Section 222(c). The presentation of the offerings as involving two services is accentuated when there are separate, independent providers.

[29] Ex Parte letter to Dorothy T. Attwood, Common Carrier Bureau, from Kathryn Marie Krause, filed Sep. 9, 1997 at 11.

[30] Additionally, CMRS providers – who have virtually unfettered rate/price discretion – could craft this type of incentive with little regulatory interference.

minutes of toll calling or free local service, or a combination of incentives.[31] In any event, it seems impossible that the Commission, lacking commercial or marketing expertise, could craft an appropriate market incentive that would assure CPNI affirmative approval rates at a level necessary to allow for ongoing commercial operations and carrier/customer communications.

3. That at an absolute monetary level, the monetary amount of the incentive being suggested to secure affirmative CPNI consent lacks any substantive intelligence as to its potential effectiveness. Unless an incentive valued at around $11 would so dramatically change the response rates over and above those reported by U S WEST, it would only result in increased costs to U S WEST because the monetary value of the incentive would go from $1 or $5 to $10 or $11. Based on the information we previously provided, that would only drive the cost per affirmative response up. To the extent that repeated direct mail and outbound calling attempts were necessary to reach a response rate in excess of 29%, the base costs would increase.[32] If one added to those increased costs incentives almost double those used by U S WEST, it is obvious that huge sums of money are involved. It remains totally obscure why a carrier should have to expend a fortune to "purchase" the right to use information in its possession internally for lawful commercial and speech purposes.

For all of the above reasons, U S WEST disputes any relevance of the WTR research survey or its response rates to a rational analysis of the ability to secure CPNI affirmative consents.

Mechanical Access Restrictions to Carrier Proprietary Information

Recently, Elridge Stafford of U S WEST's Washington, DC office was contacted regarding how U S WEST planned to protect resold account information from our retail sales representatives. In this section, we respond to that inquiry.

As we advised the Commission Staff on an earlier call regarding mechanized access control systems, all of U S WEST's current systems require that individuals accessing the system input a personal identification code. Thus, U S WEST currently has the capability to assess if an

[31] To create incentives involving either of these offerings, an incumbent carrier would undoubtedly be required to fashion a tariff offering, agreeable to a state regulator with rates, terms and conditions authority, thereby complicating the incentive offering.

[32] Ex Parte letter to Dorothy T. Attwood, Common Carrier Bureau, from Kathryn Marie Krause, filed Sep. 9, 1997 at 12. Thus, the "costs" already provided to the Commission with respect to response rates above 5 to 11% (direct mail) or 29% (outbound calling) are understated because they do not reflect that repeated attempts would have to be made to secure the affirmative consents.

individual accesses a system inappropriately, when such access was accomplished, and – in most circumstances – what information was retrieved.

U S WEST personnel have been trained regarding their obligations under Section 222(a) and (b) and that training is ongoing. Additionally, appropriate personnel in the business are in the process of revising U S WEST's internal Confidentiality policy to expand on the matter of access to and use of carrier information. That document makes clear that it is inappropriate to use such information for U S WEST's marketing efforts. Once completed, the document will not only be released to appropriate U S WEST personnel, but will be included in some form in the Annual Training undertaken by U S WEST employees.

A business may deem it appropriate to create additional mechanized access restrictions to systems, based on its own business circumstances and internal decisions.[33] But, U S WEST does not support the imposition of such a requirement by regulatory authorities. The system capabilities currently in existence allow for tracking of employee access, facilitate the investigation of any alleged wrongdoing, and allow sufficient audit trails to accomplish the objectives of Section 222.[34]

Furthermore, in light of the fact that the Commission's CPNI NPRM focused on end-user CPNI, and paid scant attention to carrier information, the record in the area of mechanized access controls regarding carrier proprietary information is sparse. If the Commission intends to pursue the matter of mechanized access controls regarding information/databases beyond the level of controls already required under the current Computer II/III obligations (controls that U S WEST believes should be eliminated), it should conduct a Further Inquiry on this matter to allow for a

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[33] U S WEST has made the business decision to implement certain mechanized system blocking, a process that should be complete around the second quarter of 1998. In the case of a resold account, if the telephone number of the individual is input by a retail service representative, the only information provided will be the Reseller Identification ("RSID"). This will enable the service representative to inform the caller of the identity of the carrier. No other end-user information (CPNI) will be available. Individuals attempting to access resold account information off-line (i.e., through a database inquiry), will be unable to secure such information in the absence of a personal identification code that is deemed authorized for such access.

[34] Recently, in an *ex parte* communication to the Commission, MCI asserted that, at least one BOC had inappropriately used carrier information to communicate with a customer who had decided to switch to MCI. Letter to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, from Mr. Frank W. Krogh, Senior Counsel and Appellate Coordinator, Federal Law and Public Policy, August 15, 1997 at 19. MCI's assertion was also made in the context of the Commission's slamming proceeding. In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129 ("Slamming Proceeding"), Comments of MCI, filed Sep. 15, 1997, at 7 and Attachment. It is clear that MCI's assertion lacks sufficient facts to determine that the actions of the BOC were inappropriate. It is quite possible that the customer communication was based on information properly accessed by the BOC (i.e., that it had "lost" customer X) and not through the inappropriate access or use of carrier information. See Slamming Proceeding, U S WEST Comments at 22, filed Sep. 15, 1997; U S WEST Reply Comments at 20-22, filed Sep. 29, 1997. Thus, the Commission should be cautious in crediting MCI's assertion with more credibility than it deserves.

more thorough presentation of evidence on existing carrier practices and the costs/benefits associated with such mechanized access controls.

MCI's August 15, 1997 and October 9, 1997 Ex Partes

U S WEST will not attempt to counter all of MCI's assertions in these *ex partes.* However, a couple of them deserve response.

August 15, 1997 Ex Parte[35]

In its August *ex parte*, MCI argues that the use of CPNI by an incumbent carrier creating and marketing service packages "presents a particularly significant threat to competition and privacy."[36] This is a ridiculous remark. There is no "threat" to either from the use of such information. There is certainly no competitive "threat." Just the opposite is true – as advocated by the Commission and found by the Courts.[37] Nor is there a threat to privacy, since the carrier using the CPNI has an existing business relationship with the individual and uses the information to craft more targeted speech and communications plans. Indeed, the use of CPNI – even in the context of service packaging – would be beneficial to competition and communication by rendering both more educated and more targeted.

In that same *ex parte*, MCI advocates mechanical, system access restrictions on BOCs' access and use of CPNI, supporting its position with the assertion that BOCs' local CPNI represents a more significant "wealth" of information than CPNI in the hands of other carriers because the latter CPNI has "many more gaps" and is "spottier."[38] There is no evidence in the record to support either claim. Indeed, the wealth of other carrier CPNI has already been amply demonstrated in the record.[39] In any event, the fact that national carriers can use 100% of their CPNI to target regional/local individuals with respect to local exchange services suggests the

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[35] Letter to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, from Frank W. Krogh, Senior Counsel and Appellate Coordinator, Federal Law and Public Policy, dated Aug. 15, 1997 ("MCI Aug. 15 Ex Parte").

[36] Id. at 10.

[37] SBC Communications Inc. v. FCC, 56 F.3rd 1484, 1994-95 (D.C. Cir. 1995) ("SBC v. FCC"); FCC Final Brief in SBC v. FCC, Nos. 94-1637 and 94-1639, at 47, 49-50.

[38] MCI Aug. 15 Ex Parte at 10-11.

[39] Ameritech Reply to Further Comments at 3, filed Mar. 27, 1997, CC Docket No. 96-115 (citing to Joseph Nacchio, AT&T Executive Vice President, Consumer and Small Business Division, speech delivered at Morgan Stanley Conference on Feb. 13, 1996; BellSouth Reply to Further Comments at 6, filed Mar. 27, 1997 CC Docket No. 96-115 (citing to America's Network, Vol. 101, No. 6 p. S14 (Mar. 15, 1997) stating that "MCI is indeed rich in customer data.").

propriety of allowing regional, local carriers to use 100% of their regional/local CPNI to compete in the national market. Each type/kind of carrier has "gaps" and "spots" in their CPNI coverage.

October 9, 1997 Ex Parte[40]

In that *ex parte*, MCI took issue with the costs presented by U S WEST – as part of a LEC Coalition *ex parte* – to accomplish systems access/use restrictions mechanically across the primary marketing databases in the Company. MCI argues that the information presented was "exaggerated by an unnecessary assumption, namely, that customer record database systems would have to be developed to override access restrictions on CPNI.[41] MCI then goes on to argue that certain types of service representatives, those it calls "multi-purpose customer service representatives,"[42] would actually not be subject to an access restriction, but only a use restriction (that could be overcome once customer approval was obtained).

Of course, the assumption that MCI claims was "unnecessary" was one made by U S WEST at the Staff's request, i.e., to report on costs associated with both access and use restrictions. Furthermore, MCI seems to believe that the legacy systems of incumbent LECs are more flexible than they are. Right now, there is no system that would allow CPNI access to a multi-purpose service representative (who, by definition, seems confined to handle accounts where at least two "buckets" of services are already purchased by the customer) but would deprive access to a single-purpose service representative who wanted to discuss a service outside the CPNI reflected on the screen. To overcome this lack of systems capability, MCI suggests that no systems capability be created, but that the customer be handed off to another service representative.

One must assume that MCI knows good quality service and customer care as well as the next carrier. Customers hate being passed off from one person to another. They want to engage with a person fully capable of handling all their customer service needs, purchasing decisions and concerns.[43] In this regard, customers of telecommunications carriers are no different from

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[40] Letter to William F. Caton, Acting Secretary, Federal Communications Commission, from Frank W. Krogh, dated October 8, 1997 ("MCI Oct. 8, 1997 Ex Parte").

[41] Id. at 2.

[42] Id.

[43] See Ameritech Ex Parte Presentation at 2, CC Docket No. 96-115, Letter to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, from Celia Nogales, Director, Federal Relations, dated Oct. 6, 1997 at "Impacts of Implementing Mechanical CPNI Blocking," "Customers will experience more call transfers, resulting in greater call duration and the need to talk to multiple representatives during the call. This is counter to clearly expressed customer preferences for shorter calls, ease of reaching the right person and single contact resolution." See also Attachment C, "Customer Satisfaction," "One call resolution – contributed 36 percent to overall customer satisfaction. This item was also rated as the number one most important attribute," in crafting CPNI approval process. "In focus groups, customers explained that they wanted to reduce the number of times they

customers of any other supplier of service – being passed around and possibly put on hold or lost in the process is a pain in the neck. Customers know this; businesses know this; presumably, MCI knows this. MCI's proposal would irritate a customer and could compel a carrier – if a choice had to be made – to create the systems capabilities to avoid the downstream customer irritation from the internal hand off.

With regard to the potential mechanized systems themselves and their costs, MCI is peculiarly ill-equipped to posit that U S WEST's cost estimates "are overstated and, even as overstated, are relatively modest."[44] Of course, the information provided the Commission Staff was a best estimate put together over a relatively short period of time. So, it is not perfect. It may be overstated, but the greater likelihood is that it is understated – as seems to be the case when one tries to imagine a system and speculate about its potential costs, particularly without raw vendor quotes regarding system design and equipment. But whatever can be said about the figures, including the $16.5 million, it is not small change and the customers of U S WEST would pay through increased rates for the privilege of having their privacy protected in this anachronistic manner. We doubt – given the trust they have in us and in light of our relationship with them – that they would consider this an "appropriate" expenditure. From their perspective, better the dollars be dedicated to new product design and development.[45]

MCI is presumably correct that it took it approximately three to six months and less money to create its mega-database. However, MCI probably had less legacy systems (both in terms of number and type) than U S WEST has and even those systems were probably "newer" than some of U S WEST's systems. (It must be remembered that U S WEST is the combination of three separate telephone companies, all of whom had their own legacy systems, many of which are still in place and work through their own interfaces, such that even now U S WEST has to have two or three "fixes" to each solution it tries to deploy in the systems across the region.). Thus, MCI's experience is of little relevance to incumbent carriers with a longer history and older, more complex, systems.

Finally, MCI addresses the U S WEST affirmative consent CPNI trial. We dispute the validity of the conclusions MCI draws from that trial. U S WEST is well aware that a 29% response rate to outbound calling is not a bad return in a telemarketing context. Indeed, it is quite respectable. **Still, we have done better.** However, U S WEST was not engaged in a telemarketing effort. We were engaged in a process where it was critical to reach an individual,

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needed to explain the reason for their call, and the number of representatives they had to talk to before they reached the right person or resolved their agenda for the call." Id. at Attachment C

[44] MCI Oct. 8, 1997 Ex Parte at 3.

[45] The Commission must remember for each dollar that carriers spend on regulation, it is one less dollar that can be put to service in promotion of their customers' interests. Indeed, Chairman Kennard's remarks come to mind: such a mechanized system is totally out of touch with a customer's "real needs and daily demands". Nor would it be consistent with an "understanding of the markets and the businesses they affect." Kennard Remarks at 4.

because the failure to do so left us without affirmative consent to access and use CPNI. In this context, a "contact rate" of 29% is abysmal. U S WEST cannot be deprived of our ability to access and use CPNI because three quarters of our customers are not reachable for one reason or another.

U S WEST must be able to access and use our CPNI to allow for educated product development and design, as well as to target communications to those most likely to be interested. We strive for a greater than 29% response rate to our telemarketing efforts because we "try harder."[46] U S WEST tries, as much as possible, to avoid "shot-gun" calling, where the call itself is more likely to be seen as an invasion of an individual's seclusion, and the content of the message is of no interest. That is why securing CPNI approval for the vast majority of our customer base is essential. The only approval process that can allow for this type of broad customer approval is a notice and opt-out process.

We dispute MCI's assertion that "even with [an] 'opt-out procedure . . . [we] would not have much better luck telemarketing to those customers"[47] for a number of reasons. First, the opt-out procedure allows access and use of CPNI beyond telemarketing. The approval forms the foundation for use of CPNI in product design, development, planning, etc. Because such a process would result in a generally high approval rate, U S WEST's commercial enterprise would not be rendered impotent due to the lack of access to its commercial information pending attempts to secure customer approval by other means – means which are not only considerably more expensive but more difficult to manage in a mass market environment.[48] Second, MCI can only speculate what "luck" U S WEST might or might not have in the telemarketing area. But even engaging in speculation, targeted marketing produces greater returns than shot-gun marketing, which is why commercial enterprises try to craft these types of marketing campaigns.

Conclusion

For all of the above reasons, U S WEST urges the Commission to construe the statutory provisions of Section 222 to allow for customer approval to access, use and disclose CPNI to be secured through a process of "Knowledge, Notice and No," i.e., a notice and opt-out process. Such a process comports with the Chairman's notions of telecommunications inclusiveness in that it allows all customers to benefit from the CPNI of all other customers, thus assuring

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[46] MCI Oct. 8, 1997 Ex Parte at 5.

[47] Id. at 4.

[48] One has to believe that MCI full well understands that carriers other than LECs can aggregate CPNI in their product design and development efforts without competitive harm. 47 U.S.C. § 222(c)(3). It is only the LECs that, by statute, are penalized for the creation of aggregated CPNI. Thus, product design and development – to remain propriety and to protect the commercial value associated with such activity, needs to be done utilizing customer-specific CPNI, not aggregated CPNI.

educated product design and communication for those customers desirous of communications with their serving carriers. The notice and opt-out model also has the distinct advantage of being educated by common sense, real customer needs, and practical business practices.

In construing Section 222, a self-effectuating statutory provision, the Commission should allow for the broadest flexibility given the universe of affected entities, i.e., all telecommunications carriers, and myriad business practices and systems. Rigid, inflexible systems controls and burdensome approval processes are antithetical to aggressive marketplace responsiveness, competitive vitality and customer care. Accordingly, they should be rejected.

Sincerely,

Kathryn Marie Krause

Kathryn Marie Krause

TRANSCRIPTION OF CASSETTE TAPE

CONGRESSIONAL PERSPECTIVES - REP. E. MARKEY

TELECOM PRIVACY IN THE US - AND FOR US COMPANIES

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TRANSCRIPTION OF CASSETTE TAPE

CONGRESSIONAL PERSPECTIVES - REP. E. MARKEY

TELECOM PRIVACY IN THE US - AND FOR US COMPANIES

MR. MARKEY: Some of you may have noted in the newspapers this week, a special panel delivered to President Clinton a classified report on the vulnerabilities in our nation's critical infrastructures, such as the electric grid, the phone network, and so on and so on. A terrorist assault, in fact, is possible, because of the vulnerabilities that exist.

I have, I brought with me a list that I'll share with you of the top computer viruses that the report highlighted as threats to the system.

Number one, the Kvorkian Virus: It helps your computer shut down as an act of mercy.

Number two, the AT&T Virus: Every three minutes it tells you what great service you're getting.

Number three, the MCI Virus: Every three minutes it tells you that you're paying too much for the AT&T Virus.

Number four, the WorldCom Virus: It swallows the MCI Virus.

Number five, the Health Care Virus: It tests your computer systems for a day, finds nothing wrong, and sends you a $2,000 bill.

And Number six, the Red Socks Virus: Your PC makes frequent errors, comes in last in the reviews, but

you still love it and hope it works better next year.

Well, I thank Ron very much. And that was quite a day -- by the way, Ron was sitting out in the audience, and I think many of you here were as well, and it was kind of the classic confrontation. On the one hand, you had our members being called -- one of our members came over to me and said, "I just got called by Bill." I said, "Bill Clinton called you?" He said, "No, Bill Gates called me on your amendment." I said, "Wow."

And then, about 10 minutes later, somebody else came up to me and said, "Louis Freeh just called me." So here is a choice, huh, for each of us to contemplate. On the one hand, you get a call from the most powerful and wealthy person in the history of the world; on the other hand, you get a call from the most powerful law enforcement official in the world, each asking for your vote.

In one of the most interesting, I think, debates that I've ever been a part of in my career in Congress, it was a situation where the debate itself actually made a difference. And gratifyingly, but somewhat surprisingly, by a vote of 35 to 15, they voted not to mandate that every computer, every bit of a software had this backdoor key that would be built into

it, to allow the police in. And that was quite a telling moment in the process, because clearly, in other committees, that had not been the view that had been taken, but something very interesting, of course, had happened, was that the issue had been engaged, that groups, Ron and others out here, along with people across the country, decided that it was worth their while to contact their Congressman, to give people their views on a subject which was very important to them.

And I think as a result, the debate is about to begin, actually, on this balance that we have to strike between cyberspace and the police. They each have a legitimate claim, each side, on this issue. And a proper balance has to be struck.

But as we began that day, in the Commerce Committee, it is clear that others had not taken the same view, which I think the people in this room have, that, in fact, we must be respectful of, number one, the ability of an individual to feel as though they're secure when they're using the technology, so that they will, in fact, be able to put their financial or their personal or their health care records out there, and know that the kid across the street with purple hair is not just going to crack through and find out all of your secrets that you're not telling your mother or your

father or other members of your family.

Two, that others across the country -- that others across world, would be very reluctant to purchase American-made goods that had this built into it, if they were about to build an 80 story tower in their country, and buy 5,000 computers to put into it, are you going to buy from a manufacturer that has built in or not built in this backdoor access to all of your information.

And third, people can download this stuff from Finland anyway, and has access to it as they want and we have to deal with the reality that a really bad person, who is very sophisticated and intent on committing a crime, is going to be downloading this stuff anyway.

And so, we've just got to deal with the realities, then, of these other competing interests, while being very respectful of the fact that proper access to the information is indispensable to the police ability to be able to deal with those that might want to terrorize our country. So that discussion is now, because of that victory, about to really begin in earnest.

Now, one of the most important parts of all of this, is that we were able to do it in a bipartisan basis. On the one hand, Mike Oxley, a Republican, and Tom Manton, a Democrat, on our committee, one a former

FBI agent, and the other a former policeman, had formulated the amendment which would take the position of the FBI. In turn, I formulated with my staff, Colin Crowell, who's in the back of the room here, an amendment that we went to Rick White with, from Washington State, a Republican, so that we could formulate a bipartisan response, because there is no real Democrat or Republican, liberal or conservative way of looking at this issue, or any of these technology-related issues. There's really a right way or a wrong way, a smart way or a dumb way, but it's doesn't basically break down Democrat or Republican.

So the substitute reiterated the right of Americans and American corporations to protect their data and conversations with the best encryption software that they can get their hands on. So it happened, it happened successfully, but it couldn't have been done without the support of the privacy groups, the consumer groups, the small businesses, the computer industry, all of the people who participated in that process. And we won because members of our committee learned a lot about this issue in the course of the debate.

My analysis of the issue is that while it's well intentioned, that is what the Oxley/Manton amendment was trying to put forward, that at the end of

the day, you really can't have a process that, first, says that every criminal is going to have to use an FBI seal of approval guaranteed computer software technology. You just can't guarantee that they're going to be willing to do that. And you can't force Americans to use technology that has a vulnerability built into it, that ultimately any sophomore at MIT would also be able to exploit. Because you had built that vulnerability into it, as they sit there with some idle time during the summer, wondering what is going on inside of all of the other computers of people in their neighborhood.

And finally, no foreign business is going to use it.

So it's been four and a half years since I held a hearing in the subcommittee where John Gage, a cyberguru from Sun Microsystems, projected up onto the wall, lines of encryption code accessible to people anywhere in the world from an online site in Finland. That code back then would have been banned from export under U.S. law. There was, and is, no law banning its import -- we could not have exported it, but there's no law banning its import into the United States.

Encryption, privacy, security, trust, and electronic commerce all go hand-in-hand. Is Citibank

going to trust this to send electronic fund transfers overseas? Will the French or Koreans or Japanese use it for highly sensitive commercial conversations or transactions? Of course they won't. American companies will suffer the economic consequences of this Cold War, anti-diluvian, anti-digital policy.

The current government policy makes little sense and ought to be thrown out.

We can fight terrorism and a criminal underworld, but we cannot hold back the future until everyone is ready for it.

The estimated number of hacker attacks on Department of Defense networks in 1995 was 250,000. In 1996, that number was 500,000 attacks. The Defense Information Systems Agency estimates that 65 percent are successful attacks, and in the private sector, things are not different.

Earlier this year, in a survey conducted for the FBI by the Computer Security Institute, a San Francisco based research organization, it was found that 75 percent of the surveyed companies had been victimized by computer-related crime in the preceding year. Almost 60 percent could place a dollar amount on their losses, and the average per company was $400,000. And the National Computer Security Association estimated that 67